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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1982

NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, AMERICAN CIVIL LIBERTIES UNION, AMERICANS FOR DEMOCRATIC ACTION, EQUAL RIGHTS ADVOCATES, LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND, NATIONAL BAR ASSOCIATION -- WOMEN'S DIVISION, NATIONAL ORGANIZATION FOR WOMEN, NATIONAL WOMEN'S LAW CENTER, NATIONAL WOMEN'S POLITICAL CAUCUS, WOMEN EMPLOYED, WOMEN FOR RACIAL AND ECONOMIC EQUALITY, WOMEN'S EQUITY ACTION LEAGUE, WOMEN'S LAW PROJECT, AND WOMEN'S LEGAL DEFENSE FUND,

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As *Amici Curiae*
In Support of Respondent

INTEREST OF AMICI CURIAE

This Brief amici curiae in support of respondent is submitted on behalf of the American Association of University Women, the American Civil Liberties Union, Americans for Democratic Action, Equal Rights Advocates, the League of Women Voters of the United States, the Mexican American Legal Defense and Education Fund, the National Bar Association -- Women's Division, the National Organization for Women, the National Women's Law Center, the National Women's Political Caucus, Women Employed, Women for Racial and Economic Equality, the Women's Equity Action League, the Women's Law Project, and the Women's Legal Defense Fund.*/

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*/ Amici have obtained the written consent of both parties to the filing of this Brief; copies of the letters setting forth such consent have been filed with the Clerk of the Court.

Amici are private non-profit organizations committed to equal employment opportunity for women and men. Their efforts to achieve that goal include public education, legal representation, and advocacy as to public policy and legislation. Amici all believe that this case presents issues of major significance to the interpretation of the Pregnancy Discrimination Act ("PDA") and to the equal employment rights of men and women. Many of the present amici were part of a broad-based coalition of groups that worked for this legislation. One of their major goals in supporting this legislation was to ensure that the rationale of General Electric Co. v. Gilbert, 429 U.S. 125 (1976), was replaced by the more "common sense" notion that pregnancy-based classifications are sex-based classifications, in whatever employment-related context they occur. Amici are concerned that a holding that the Gilbert rationale survives in any way would sanction an exception to the broad

nondiscrimination principle embodied in Title VII of the Civil Rights Act and would undermine the entire purpose and spirit of that statute and of the Pregnancy Discrimination Act.

SUMMARY OF ARGUMENT

I. This case, the first before this Court involving the 1978 Pregnancy Discrimination Act ("PDA") amendment to Title VII of the Civil Rights Act of 1964, involves a claim of sex-based discrimination against male employees in an employer-provided hospitalization and medical-surgical insurance plan. Petitioner's plan limits the hospitalization benefits receivable for the pregnancy-related expenses of the spouses of male employees, but contains no such limitation for any class of benefits receivable for the spouses of female employees. The gravamen of the male employees' sex discrimination claim is that this disparity in the benefits that employees receive for their spouses necessarily reflects unlawful sex-based discrimination against the male employees themselves.

II. Insisting that this Court's decision in General Electric Co. v. Gilbert, 429 U.S. 125 (1976), governs claims of pregnancy-based discrimination by men, petitioner urges this Court to disregard the will of Congress as expressed in its unambiguous rejection of that decision's interpretation of sex discrimination under Title VII. Congress' intent that there be no exceptions to its interpretation is conclusively demonstrated by its decision to enact the PDA in the form of a definitional amendment to Title VII, to clarify that pregnancy-related discrimination constitutes unlawful sex discrimination under that statute; indeed, Congress could not have intended an exception to that broad definition for claims by men because such an exception would be contrary to the entire underlying purpose and structure of Title VII.

Moreover, the language of the definitions section supplied by the PDA contains

no support for creating any exception to the broad definition emboided in its first clause, nor does the apparent reference in the second clause of that section to women who work necessarily limit the reach of the first clause to claims by women. By attempting to read the language of the PDA alone as providing the entire basis for claims of pregnancy discrimination, petitioner misses the point of Title VII and of this case.

Finally, the legislative history directly contradicts petitioner's position. The various references to the plight of female workers affected by pregnancy discrimination do not preclude claims by male workers so affected, and the references to the specific problem at issue here -- medical benefits plans that cover employees' spouses -- all support the holding that petitioner's practice is unlawful. In particular, the Senate Human Resources Committee instructed

that the lawfulness of such plans would be measured by "basic principles of Title VII law." The Committee assumed that application of such principles, which could not include the Gilbert rationale, would invalidate such plans.

III. The basic Title VII principles relevant to this case are three: first, that Title VII's prohibition of sex discrimination is even-handed, and extends to discrimination against men as well as against women; second, that employer-provided medical benefits plans are a form of employment-related treatment within the purview of that statute; and third, that benefits plans that affect male and female employees' spouses differently are a form of disparate treatment as to the employees themselves and therefore also fall within the purview of Title VII. Application of these principles, in conjunction with the PDA's principle that pregnancy-related discrimination constitutes

sex discrimination, compels the holding that petitioner's imposition of a flat-rate ceiling for pregnancy benefits for male employees' spouses with no similar ceiling for any benefits for female employees' spouses violates Title VII.

ARGUMENT

I. INTRODUCTION

This case involves sex-based employment discrimination against men. Petitioner's Hospitalization and Medical-Surgical Plan (the "Plan"), which provides comprehensive hospitalization benefits for employees, their spouses, and certain dependents, contains a flat-rate ceiling on spousal hospitalization benefits for only one covered condition -- normal pregnancies. Thus, petitioner's male employees, such as John McNulty, the original charging party in this case, receive less complete coverage for their spouses than do petitioner's female employees. Male employees are forced to bear their spouses' hospitalization costs for a substantial class of medical conditions; female employees are faced with no such gap in hospitalization coverage for their spouses.

Petitioner argues that the lawfulness of this practice is not governed by Title VII as amended by the Pregnancy Discrimination Act, but by this Court's decision in General Electric Co. v. Gilbert, 429 U.S. 125 (1976). According to petitioner, only those Title VII sex discrimination claims brought by women employees or applicants for employment are affected by the Pregnancy Discrimination Act. Under petitioner's theory, no male could ever challenge a pregnancy-based policy even if he were harmed by it. For the reasons discussed below, the reasoning upon which the Gilbert decision was based has no continuing validity under Title VII. Petitioner's practice, properly evaluated under Title VII as amended by the Pregnancy Discrimination Act, unlawfully discriminates against men.

II. IN ENACTING THE PREGNANCY DISCRIMINATION ACT, CONGRESS INTENDED THE REASONING UPON WHICH THE GILBERT DECISION WAS BASED TO HAVE NO CONTINUING VALIDITY UNDER TITLE VII.

In General Electric Co. v. Gilbert, 429 U.S. 125 (1976), this Court considered an "important issue in the construction of Title VII [of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq. (1981)]"[1/] -- whether pregnancy-based discrimination is a form of sex discrimination unlawful under that statute -- and decided that it was not. The underlying rationale of Gilbert was that pregnancy-based distinctions are not equivalent to distinctions based on gender "as such," since they divide a population into "pregnant women and nonpregnant persons."[2/]

Congress, disagreeing with the Court's statutory construction, responded promptly

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1/ 429 U.S. at 133.

2/ Id. at 135.

with the introduction in each House of bills to overturn the Court's interpretation.[3/] The bills enjoyed widespread Congressional and public support[4/] and were considered thoroughly in extensive hearings and debate.[5/] The resulting legislation --

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3/ S. 995, 95th Cong., 1st Sess. (1977); H.R. 5055, 95th Cong., 1st Sess. (1977), later amended and reintroduced as H.R. 6075, 95th Cong., 1st Sess. (1977).

4/ S. 995 was reported out of Committee with 29 co-sponsors. H.R. 5055 was introduced with 82 co-sponsors, and was reported out of Committee with 119 co-sponsors. S. Rep. No. 331, 95th Cong., 1st Sess. 3 (1977); H.R. Rep. No. 948, 95th Cong., 2d Sess. 4 (1978) [hereafter cited as "Senate Report" and "House Report", respectively]. The legislation was supported by a wide range of organizations, including the AFL-CIO, the American Citizens Concerned for Life, the League of Women Voters of the United States, and the NAACP. See Legislation to Prohibit Sex Discrimination on the Basis of Pregnancy: Hearings on H.R. 5055 and H.R. 6075 Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor, 95th Cong., 1st Sess. 62, 198, 265 (1977) (statements of Laurence Gold, Special Counsel, AFL-CIO; Clarence Mitchell, Director, NAACP; and the League of Women Voters of the United States, respectively); Id., Part 2 at 63 (statement of Dorothy Czarnecki, American Citizens Concerned for Life).

5/ Hearings were held in the House on April 6 and June 29, 1977, and in the Senate on April 26, 27, and 29, 1977.

the Pregnancy Discrimination Act ("PDA")[6/] -- was signed into law on October 31, 1978.[7/]

As articulated by the Senate Human Resources Committee, the purpose of the legislation was simple but comprehensive: to "make clear that the prohibitions against sex discrimination in [Title VII] include discrimination in employment on the basis of pregnancy or pregnancy related disabilities."[8/] Both Houses stated explicitly that the legislation was intended to clarify that the "commonsense" views expressed by the dissenters in Gilbert "correctly express

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6/ Pub. L. No. 95-555, 92 Stat. 2076.

7/ Even prior to passage of the PDA, this Court's decision in City of Los Angeles, Dept. of Water and Power v. Manhart, 435 U.S. 702, 725 (1978), appeared to cast doubt on the continuing validity of Gilbert. (Manhart "cuts back on General Electric...and, indeed, makes the recognition of [that case] as continuing precedent somewhat questionable") (Blackmun, J., concurring in part and in the judgment).

8/ Senate Report, supra note 4, at 1. Accord, House Report, supra note 4, at 1.

both the principle and the meaning of Title VII."[9/]

Nevertheless, petitioner and supporting amici in the instant case insist that there is still life to the rejected Gilbert reasoning. They contend that the PDA applies solely to challenges by female employees or applicants for employment,[10/] and thus urge the Court to resurrect the Gilbert rationale for all but that limited class of cases. But, to quote the court below, the PDA cannot be read "so narrowly as to

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9/ Senate Report, supra note 4, at 2. Accord, House Report, supra note 4, at 2. Members of Congress repeatedly expressed disagreement with the rationale underlying the Gilbert decision. E.g., 123 Cong. Rec. 7539-40 (1977) (remarks of Sen. Williams); id. at 7541 (Sen. Brooke); id. at 29641-42 (1977) (Sen. Bayh); 124 Cong. Rec. H6863 (daily ed. July 18, 1978) (Rep. Hawkins); id. at H6865 (Rep. Green).

10/ The court in EEOC v. Lockheed Missiles and Space Co., 680 F.2d 1243, 1246 (9th Cir. 1982), petition for cert. filed, No. 82-1006 (Dec. 15, 1982), took a similar position. ("PDA did no more than provide that an exception to Title VII's basic principles was to apply in the case of women employees.")

overturn the specific holding in Gilbert without affecting the reasoning upon which it was based." Newport News Shipbuilding and Dry Dock Co. v. EEOC, 667 F.2d 448, 451, aff'd en banc, 682 F.2d 113 (4th Cir. 1982) (per curiam). The assertion that the Gilbert rationale survives in any class of cases disregards Congress' repeated expressions of dissatisfaction with that decision.11/

11/ See note 9, supra. As this Court has recognized, once the legislature has "intimated its will. . .that will should be recognized and obeyed." United States v. Hutcheson, 312 U.S. 219, 235 (1941) (citation omitted). In Hutcheson, as in this case, the Court was faced with construction of a statute intended to overturn a prior Supreme Court statutory interpretation, and a party urged continued life to the rejected precedent. Congress had previously provided antitrust immunity for certain labor activity, but a decision of this Court, Duplex Printing Press Co. v. Deering, 254 U.S. 443 (1921), had interpreted that immunity restrictively to apply only to trade union activities directed against an employer by his own employees. To correct this interpretation, Congress enacted the Norris-LaGuardia Act and "defined its conception of a 'labor dispute' in terms that no longer leave room for doubt." Hutcheson, 312 U.S. at 234. Nevertheless, the Government in Hutcheson argued that the

(footnote cont'd)

The will of Congress -- that the interpretation of sex discrimination underlying the Gilbert decision have no continuing validity under Title VII under any circumstances -- is demonstrated by the structural placement of the PDA in Title VII, by the language of the PDA, and by its legislative history. We will treat these arguments sequentially.

A. Congress' Decision to Amend the Definitions Section of Title VII Demonstrates its Comprehensive Rejection of the Gilbert Court's Rationale.

The Gilbert decision rested on the premise that pregnancy discrimination[12/] is not sex discrimination per se under Title

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(footnote cont'd)

discredited Duplex case "still govern[ed]" in the context of a criminal prosecution. This Court soundly rejected this attempt to resurrect the precedent and restrict the new law as contrary to "the will of Congress."

12/ As used herein, "pregnancy discrimination" refers to discrimination on the basis of pregnancy, childbirth, and related medical conditions.

VII.[13] In enacting the PDA, Congress chose the most direct means of rejecting the Court's premise -- it amended the definitions section of Title VII to clarify that pregnancy-based classifications are sex-based classifications as a matter of law.[14] The fact that the PDA is in the form of a definition negates petitioner's contention that it "applies" only to claims of female employees or applicants for employment.[15] Since a definition by its very nature and purpose applies generally throughout a

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13/ The Court did recognize that a pregnancy-related distinction would be unlawful if it were a pretext for sex discrimination, or if a gender-based effect were shown. 429 U.S. at 135-37. Since the PDA clarifies that a pregnancy classification is a sex-based classification as a matter of law, the questions of "pretext" and "effect" are not at issue here.

14/ The PDA amended the definitions section of Title VII to add a new subsection, §701(k), 42 U.S.C. §2000e(k) (1981), which explains that sex discrimination includes, but is not limited to, discrimination on the basis of pregnancy, childbirth, and related medical conditions.

15/ Brief for Petitioner ("Pet. Br.") at 10-13.

statute, Congress could only have intended that §701(k) apply to all claims of unlawful sex discrimination under Title VII, including those made by men. By amending Title VII in this manner, Congress avoided the impossible task of attempting to enumerate all conceivable manifestations of the problem it wished to address.

If Congress had intended to limit pregnancy discrimination claims to women employees and applicants, it would have done so by adding an unambiguous proviso or exception to Title VII.[16/] This is particularly so given the structure of that statute. The substantive core of Title VII is the general

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16/ Cf. North Haven Board of Education v. Bell, ___ U.S. ___, 102 S. Ct. 1912, 1918 (1982), in which this Court interpreted Title IX of the Education Amendments of 1972, 20 U.S.C. §1681 et seq. (1978), as not limited to claims by students or beneficiaries. ("Congress easily could have substituted 'student' or 'beneficiary' for the word 'person' if it had wished to restrict the scope of §901(a).")

prohibition against discrimination set forth in §§703 and 704 of the statute;[17] without exception, defenses or limitations to this broad prohibition are set forth explicitly in specific provisos or exemptions.[18] Thus, no other exceptions can be implied.[19]

17/ 42 U.S.C. §§2000e-2 and 2000e-3 (1981). The remaining sections of the statute determine the scope of this general prohibition and establish the mechanisms for its enforcement. It is against the statute's general prohibition of employment discrimination that the courts measure the lawfulness of particular employment-related practices.

18/ See, e.g., §702, 42 U.S.C. §2000e-1 (1981) (exemption for religious preferences by religious corporation) ("This subchapter shall not apply"); §703(e), 42 U.S.C. §2000e-2(e) (1981) (BFOQ defense and exemption for religious preference for religious schools) ("Notwithstanding any other provision of this subchapter"); §703(i) 42 U.S.C. §2000e-2(i) (1981) (preferences for Indians on Indian reservations) ("Nothing contained in this subchapter shall apply"). Indeed, Congress added such an unambiguous exception in the PDA itself, with regard to health insurance coverage for certain abortions.

19/ "Especially where there is an express exception, it comprises the only limitation on the operation of the statute and no exceptions will be implied." 2A C. Sands, Statutes and Statutory Construction §47.11 (4th ed. 1972).

Furthermore, establishment of an exemption to Title VII's ban on sex discrimination for a certain class of claims by male employees would contradict the basic principle of even-handed nondiscrimination embodied in that statute.[20/] It is well-established that Title VII's prohibition of sex discrimination covers claims by men as well as by women, just as its prohibition of race discrimination covers claims by whites as well as by blacks.[21/] Even the explicit

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20/ This principle is one of the "existing Title VII principles" by which the Senate Human Resources Committee instructed that the question of the validity of spousal benefits plans "would be determined." Senate Report, supra note 4, at 6. See infra at 36-42.

21/ See, e.g., McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976); Whiting v. Jackson State Univ., 616 F.2d 116 (5th Cir. 1980), and Haber v. Klassen, 540 F.2d 220 (6th Cir. 1976) (per curiam) (claims of race discrimination by whites); Hicks v. ABT Assoc., 572 F.2d 960 (3d Cir. 1978) (claim of race and sex discrimination by white male); Saunders v. Hercules, Inc., 510 F. Supp. 1137 (W.D. Va. 1981) (claim of sex discrimination by a male). Cf. United Steelworkers v. Weber, 443 U.S. 193 (1979) (race discrimination challenge to affirmative action plan by a white male).

statutory exemptions to the nondiscrimination standard must apply equally; e.g., an employer may assert a bona fide occupational qualification ("BFOQ") for a woman or for a man.[22/]

Petitioner argues that since the PDA was designed to benefit women, it applies only to Title VII claims by women, and bars every claim by men of sex discrimination based on pregnancy.[23/] Neither Congress nor this Court has ever sanctioned such a sweeping exception to Title VII's nondiscrimination principle.[24/]

22/ The BFOQ exception is found in §703(e)(1) of Title VII, 42 U.S.C. §2000e-2(e)(1) (1981). See, e.g., Dothard v. Rawlinson, 433 U.S. 321 (1977) (BFOQ for men); Diaz v. Pan Am. World Airways, Inc., 442 F.2d 385 (5th Cir.), cert. denied, 404 U.S. 950 (1971); Saunders v. Hercules, 510 F. Supp. 1137 (W.D. Va. 1981) (BFOQ for women).

23/ Pet. Br. at 13-19.

24/ Under Title VII, explicit race- or sex-based treatment may be permissible on a case-by-case basis, if it is ordered by a court to remedy past discrimination or undertaken voluntarily by an employer to correct the result of past

(footnote cont'd)

We do not dispute that the primary goal of Congress in enacting the PDA was to relieve women employees and applicants of the burden of pregnancy discrimination; the legislative history is replete with references to this goal, and the catalyst for the PDA, the Gilbert decision, involved just such a situation. Similarly, the underlying goal of Title VII itself is to relieve blacks, ethnic and religious minorities, and women employees of the burdens of discrimination due to their membership in these classes. But as the courts have recognized, invidious discrimination may also be visited upon members of the usually more favored

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(footnote cont'd)

discrimination. United Steelworkers v. Weber, 443 U.S. 193 (1979). Thus, the "affirmative action" doctrine could not provide the basis for sex-based treatment in an entire class of cases, as petitioner suggests.

classes, e.g., males.[25] Under Title VII, such discrimination is unlawful.[26]

Because the PDA amends Title VII, to the extent that men might be burdened by discrimination based on pregnancy, Title VII as amended by the PDA covers such discrimination. Indeed, Congress could not have intended that Title VII as amended by the PDA treat claims of pregnancy discrimination against men any differently than other

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25/ Because sex discrimination policies are often the product of the "role-typing society has long imposed" upon the sexes, Stanton v. Stanton, 421 U.S. 7, 15 (1975), not only do they generally exclude women from the spheres traditionally reserved for men, but they also may exclude men from women's traditional roles. See, e.g., Mississippi University for Women v. Hogan, ___ U.S. ___, 102 S. Ct. 3331 (1982) (men barred from nursing school); Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142 (1980) (denial of worker's compensation to widowers without proof of dependency); Orr v. Orr, 440 U.S. 268 (1979) (men not entitled to be paid alimony).

26/ Therefore, Kahn v. Shevin, 416 U.S. 351 (1974), and other cases upholding "remedial" sex discrimination under the Constitution, e.g., Califano v. Webster, 430 U.S. 313 (1977) (per curiam), and Schlesinger v. Ballard, 419 U.S. 498 (1975), are inapposite.

claims of sex discrimination against men are treated under Title VII generally. At the very least, a "clear congressional mandate" would have been required to effectuate so major a departure from the theory underlying the statute to which the PDA was a simple definitional amendment.[27/]

B. The Language of the PDA Provides No Support for the Contention that Pregnancy Discrimination Claims Under Title VII as Amended May be Brought Only by Female Employees or Applicants for Employment.

In enacting the PDA, Congress intended to clarify the meaning of sex discrimination

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27/ In rejecting a limitation to the broad scope of Title VII, this Court recently explained that:

> As Congress itself has indicated, a "broad approach" to the definition of equal employment opportunity is essential to overcoming and undoing the effect of discrimination....We must therefore avoid interpretations of Title VII that deprive victims of discrimination of a remedy, without clear congressional mandate.

County of Washington v. Gunther, 452 U.S. 161, 178 (1981).

under Title VII. The very first clause of that Act accomplishes the Congressional purpose by stating that:

> [t]he terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions. . . .

Nowhere on the face of this broad definition is the statute limited to Title VII claims brought by female employees or applicants for employment.

However, petitioner argues that the second clause of this sentence of the PDA --

> and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . .

-- restricts the reach of the broad definition articulated in the first clause to female employees or applicants for

employment.[28] There is no statutory basis for this contention. The use of the term "and" between the two clauses contradicts any suggestion that the second clause limits or subtracts from the broad sweep of the first. In addition, if petitioner's reading of the statute is followed, the second clause would cover the entire meaning and reach of the PDA; this would reduce the first clause to mere surplusage, "in violation of the elementary canon of construction that a statute should be interpreted so as not to render one part inoperative."[29]

In the case of the PDA, the two clauses are not co-extensive, as petitioner construes them. Rather, the second clause serves the important function of

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28/ Pet. Br. at 11-13.

29/ Colautti v. Franklin, 439 U.S. 379, 392 (1979) (citing United States v. Menasche, 348 U.S. 528, 538-39 (1955)).

demonstrating the application of the broad first clause to certain employment-related practices with which Congress was most concerned.30/ Congress wanted to ensure that the courts interpret Title VII as amended to prohibit employers from "treat[ing] pregnancy and its incidents as sui generis, without regard to its functional comparability to other conditions." Senate Report, supra note 4, at 4. Thus, the second clause sets forth a guiding principle for the courts to use in analyzing certain pregnancy discrimination claims by providing a "functional comparability" method of analysis. Application of this "functional comparability" analysis to pregnant employees -- concededly the focus of Congressional concern -- yields the result that when pregnant employees are able to work, they, like other employees

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30/ E.g., the temporary disability plan presented in Gilbert and other practices that penalize women for being pregnant, such as forced maternity leave.

who are able to work, must be allowed to do so; however, when pregnant employees are unable to work, they must be afforded the same fringe benefits, including sick leave and temporary disability coverage, as are provided to other employees who are also unable to work.[31/] At the very least, therefore, the second clause illuminates the first; it certainly does not limit it.

Petitioner's main argument in support of its restrictive construction of the PDA is based on an attempted and mechanical substitution of the definitional language in the first clause for the term "because of sex" in §703(a)(1). Supposedly performing

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31/ The court below applied this functional comparability standard of the second clause to this case, holding that its language is not limited to employees or applicants for employment, and that the reference to "ability or inability to work" "denotes disability." 667 F.2d 448, 451. Because Title VII as amended by the first clause is sufficient to invalidate petitioner's Plan, it is not necessary to reach the application of the second clause to this case.

such a substitution, petitioner then concludes that the pregnancy discrimination prohibited by this formulation is limited to discrimination because of an employee's own pregnancy, childbirth, or related medical conditions.[32/] Since men cannot become pregnant, reasons petitioner, they cannot make claims of pregnancy discrimination.

The short answer to this argument is that petitioner's substitution simply cannot be accomplished, since the phrases "because of sex" or "on the basis of sex" -- for which petitioner wishes to substitute the language of the PDA -- do not appear anywhere in Title VII. Petitioner's construction of the statute is made in "a spirit of mutilating narrowness"[33/] which misses the point of this case and ignores the central

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32/ Pet. Br. at 10-11.

33/ United States v. Hutcheson, 312 U.S. 219, 235 (1941).

purpose of Title VII as amended by the PDA. No one is claiming that men can become pregnant. The point of this case is that pregnancy-based classifications may constitute sex-based classifications which unlawfully discriminate against men on the basis of their sex, not their pregnancies, as demonstrated infra, at 47-48. This Court has previously rejected the type of simplistic and mechanical reading of a civil rights statute which petitioner urges here and should do so in this case.[34/]

Petitioner's misunderstanding of this case, of Title VII, and of the PDA is demonstrated by its unsupported assumption that --

> [h]ad Congress wished to require employers' medical insurance plans to cover the pregnancies of male employees' spouses, it would have

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34/ McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273, 287 (1976).

> required fringe benefit plans covering the pregnancies of female employees to also cover the pregnancies of the wives of male employees.35/

In other words, petitioner assumes that Congress would have required equality of treatment between female employees and the spouses of male employees had it intended spousal benefits plans to cover pregnancies. From this assumption, petitioner concludes that since Congress expressly negated any intent to require pregnancy coverage for spouses of employees equal to that provided to female employees,36/ Congress could not have intended that Title VII as amended require coverage of the pregnancies of male employees' spouses under any circumstances.

35/ Pet. Br. at 30.

36/ See, e.g., Senate Report, supra note 4, at 5-6; 123 Cong. Rec. 29642 (1977) (statement of Sen. Bayh).

Petitioner's analysis is totally erroneous, for its assumption compares employees to non-employees (spouses), which, under Title VII, is an irrelevant comparison. The only valid comparison under that statute is between employees. The gravamen of this case is that petitioner's male employees are treated less favorably with respect to spousal hospitalization benefits than are petitioner's female employees.

C. Nothing in the Legislative History of the PDA Supports the Contention that Pregnancy Discrimination Claims Under Title VII as Amended May be Brought Only by Female Employees or Applicants for Employment.

Petitioner and supporting amici cite at length the many references in the legislative history of the PDA to Congress' desire to alleviate the burdens upon working women caused by pregnancy discrimination. They read these references as a limitation upon the PDA to claims raised by female employees

or applicants. The legislative history, however, is not so confining. Given the post-Gilbert context in which Congress was acting, its focus upon women workers is not at all surprising. However, that focus is no more indicative of an intent to exclude males from the coverage of the PDA than is a focus upon blacks in connection with a statute prohibiting race discrimination indicative of an intent to exclude whites from its coverage.37/ Nothing in Congress' focus upon women is inconsistent with the Fourth Circuit's holding that Title VII, as amended by the PDA, applies to claims of pregnancy discrimination by male employees.38/

37/ Nor does the fact that most of the legislative history of the PDA is focused upon employees rather than applicants for employment indicate an intent to exclude applicants. Yet petitioner does not dispute that Title VII as amended by the PDA covers pregnancy discrimination against applicants.

38/ Significantly, petitioner ignores the following remarks of Senator Williams which indicate that,

(footnote cont'd)

Moreover, these references to women workers simply do not illuminate Congressional intent with respect to the issue herein, i.e., the lawfulness of pregnancy discrimination in the provision of spousal health benefits. None of the legislative history specifically addressing this issue supports petitioner's position that the PDA is limited to claims by women; to the contrary, it supports the holding of the Fourth Circuit in this case.

(footnote cont'd)

under Title VII as amended by the PDA, childcare leave could not lawfully be denied to male employees if provided to female employees:

> The legislation would require only that the opportunity to take a parenthood leave to meet the requirements of childcare during early infancy be provided on a nondiscriminatory basis. Thus, it would be equally as valid to permit a man to take a voluntary leave for the purposes of childcare as it would be to permit a woman who had recently given birth to take a voluntary leave for that purpose.

124 Cong. Rec. S18978 (daily ed. Oct. 13, 1978).

The Senate Report addressed this issue at greatest length.[39/] Explaining how health insurance plans that cover spouses are to be treated under Title VII as amended by the PDA, the Report states in pertinent part that while

> the basic purpose of this bill is to protect women employees, it does not alter the basic principles of Title VII law as regards sex discrimination. Rather, this legislation clarifies the definition of sex discrimination for Title VII

39/ Also, during the debate preceding Senate enactment, Senators Bayh and Cranston expressly took the position advocated by the EEOC here. 123 Cong. Rec. 29642 (1977) (remarks of Sen. Bayh); 123 Cong. Rec. 29663 (1977) (remarks of Sen. Cranston).

Petitioner relies on a colloquy between Senators Williams and Hatch during the Senate debate in which Senator Williams responded to Senator Hatch's questions about the scope of the PDA's coverage by indicating that it applies to women employees. 123 Cong. Rec. S15038-39 (daily ed. Sept. 16, 1977). This reliance, however, is misplaced, since a careful reading of the colloquy reveals that Senator Williams was referring throughout the dialogue only to application of the statute to income maintenance plans, which of course are provided to employees only. Health benefits, in contrast, cover medical and hospitalization costs, and are commonly provided to spouses and dependents of employees as well as to employees themselves.

> purposes. Therefore the question in regard to dependents' benefits would be determined on the basis of existing Title VII principles.
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> * * *
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> Presumably because plans which provide comprehensive medical coverage for spouses of women employees but not spouses of male employees are rare, we are not aware of any Title VII litigation concerning such plans. It is certainly not this committee's desire to encourage the institution of such plans. If such plans should be instituted in the future, the question would remain whether under Title VII, the affected employees were discriminated against on the basis of their sex as regards the extent of coverage for their dependents.

Senate Report, supra note 4, at 5-6 (emphasis added).[40/]

Petitioner contends that the "existing Title VII principles" referred to in this passage include those enunciated in Gilbert. This suggestion is "fundamentally incompatible with the PDA's legislative history,

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40/ See also Senate Report, supra note 4, at 3-4.

which reflects Congress's displeasure with the Gilbert Court's analysis."[41/] Given that legislative history, it is at best a "dubious inference that Congress intended in any way to endorse Gilbert as applicable for any manifestation of employment-related pregnancy discrimination."[42/]

The only logical reading of the phrase "existing Title VII principles" is that it refers to the "basic principles of Title VII law" referred to earlier in the passage, namely, the well-developed body of law that governs claims under that statute.[43/] It

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41/ Note, "Spousal Benefits Under the Pregnancy Discrimination Act", forthcoming in 50 George Washington L. Rev. __ (August 1982).

42/ Id. Also, the fact that the Senate Committee clearly viewed with disfavor such spousal benefits plans as petitioner's further undercuts any notion that the Committee intended the lawfulness of such plans to be judged according to the rationale of Gilbert. See Senate Report, supra note 4, at 6.

43/ As Congress well knew when it passed the PDA as an amendment to Title VII, the provisions of that statute have been the subject of extensive judicial

(footnote cont'd)

is absurd to suggest that these "basic principles" could include the Gilbert rationale, since the Committee explicitly stated that the bill does "not alter" those principles, and there can be no question that Congress meant to "alter" Gilbert.

According to the Committee, then, spousal benefits plans would be unlawful under Title VII as amended by the PDA if they were invalidated by application of basic Title VII principles, operating in conjunction with the clarified definition of sex discrimination. Furthermore, relying on the opinion of the Administration and on its own understanding of the relevant basic Title VII principles, the Committee assumed that application of such basic Title VII

(footnote cont'd)

and administrative interpretation and refinement since its original enactment in 1964. The "basic principles" relevant to this case are discussed infra, at 43-47.

principles would indeed invalidate such plans.44/

The Committee did not choose, however, to perform the entire analysis that would determine how discriminatory spousal medical benefits plans would fare under Title VII as

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44/ Senator Javits, the ranking Republican on the Senate Human Resources Committee, had requested in writing the Administration's views on application of the legislation to spousal benefits plans and had received joint answers from the EEOC, the Department of Labor, and the Department of Justice expressing the view that absent changes in the language of the bill or its legislative history, general Title VII principles as amended by the PDA would require coverage of pregnancy-related medical costs of male employees' spouses if comprehensive spousal benefits are otherwise provided. See Brief for the Respondent in Response to the Petition for Certiorari, at 12-13, nn.14-15. A short time later the Committee issued the Report quoted above, without making any changes in the language of the bill or its legislative history.

On the Senate floor, Senator Cranston took the position that "such a plan would indeed be discriminatory." 123 Cong. Rec. S15058 (daily ed. Sept. 16, 1977). The only other Senator to address this question directly was Senator Bayh, who reached the same conclusion. 123 Cong. Rec. S15037 (daily ed. Sept. 16, 1977).

amended by the PDA. There are two reasons for the Committee to have made this choice. First, as has been noted above, Congress correctly believed that the primary burden of pregnancy discrimination falls upon women workers. As a result, the Committee in its deliberations concerned itself primarily with that aspect of such discrimination. At the same time, the Committee did not believe that plans like the one at issue here were a matter of great concern, since it assumed that such plans "are rare."45/ Thus, the Committee chose not to consider the question further, confident that the already-developed principles of Title VII law would determine the legality of such spousal

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45/ Senate Report, supra note 4, at 6. Senator Cranston, a member of the Senate Human Resources Committee, confirmed that the presumed rarity of these plans prompted the Committee's decision not to "directly answer the question of whether such plans would be discriminatory under Title VII." 123 Cong. Rec. S15058 (daily ed. Sept. 16, 1977).

benefits plans, should the question ever arise.[46/]

III. PETITIONER'S MEDICAL BENEFITS PLAN UNLAWFULLY TREATS MALE EMPLOYEES LESS FAVORABLY THAN THEIR FEMALE COUNTERPARTS.

While the Senate Report chose not to analyze further the question of the lawfulness of such plans as petitioner's, the conclusion that petitioner's Plan is invalid is compelled by application of the "basic principles of Title VII law" and the

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46/ Following enactment of the PDA, the EEOC amended its Guidelines on Discrimination Because of Sex, adopting the position as to spousal benefits which it had expressed to the Senate Human Resources Committee prior to passage. 29 C.F.R. §1604.10 (Questions and Answers 21 and 22). See note 44, supra. Since Congress passed the PDA knowing that this was the EEOC's position, the EEOC's guidelines on this point are entitled to especially great deference. Moreover, they are consistent and contemporaneous statutory interpretations which suffer from none of the other infirmities that led this Court in Gilbert to disregard the relevant aspects of the guidelines discussed therein. Cf. Nashville Gas Co. v. Satty, 434 U.S. 136, 142-43 n.4 (1977) (Court deferred to portion of EEOC guideline regarding job seniority policies).

clarified definition of sex discrimination provided by the PDA. We will first examine those "basic principles," and then apply them to the facts of this case.

A. "Basic Principles of Title VII Law" Govern Claims by Men, Claims of Discrimination in Fringe Benefits, and Claims Involving Spousal Benefits.

Of the range of "basic principles of Title VII law" that apply to cases brought under that statute, three are particularly relevant to resolution of the issue in this case. The first is that men may be the victims of sex discrimination, and have a cause of action for the harm that it causes them. This is the principle of even-handed nondiscrimination that has been discussed previously.[47/] The second relevant principle is that fringe benefits, including insurance plans of various types, are covered

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47/ Supra, at 21-25.

by §703(a) of Title VII. City of Los Angeles, Dept. of Water and Power v. Manhart, 435 U.S. 702 (1978).

The third basic principle is the logical extension of the first two: because employees necessarily have spouses of the opposite sex, provision of different spousal benefits to male and female employees constitutes disparate treatment as to the employees themselves based on their sex.[48/] In other words, under Title VII, sex-based differences in treatment of employees' spouses constitute sex-based differences in treatment of the employees themselves. Moreover, this principle is well-established in a series of Constitutional sex discrimination cases

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48/ Wambheim v. J.C. Penney Co., 642 F.2d 362 (9th Cir. 1981) (health insurance for spouses provided disparately according to the sex of the employee); EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. §1604.9(d)(1973).

premised on equal protection grounds.[49/] Thus, for example, it was held to have been unconstitutional for Congress to have provided in the Social Security Act for survivor benefits for widows, but not for widowers, because the different treatment unjustifiably discriminated against female workers required to pay Social Security taxes by affording them less protection for their survivors than was provided to male workers for their survivors. Weinberger v. Wiesenfeld, 420 U.S. 636 (1975).[50/]

49/ Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142 (1980); Califano v. Goldfarb, 430 U.S. 199 (1977); Weinberger v. Wiesenfeld, 420 U.S. 636 (1975); Frontiero v. Richardson, 411 U.S. 677 (1973).

50/ Similarly, in Wengler v. Druggists Mutual Ins. Co., 446 U.S. 142 (1980), the Court invalidated under the Equal Protection Clause a state statute that provided death benefits to a deceased male worker's widow automatically, but to a deceased female worker's widower only upon a showing of his incapacity or dependency. The court explained that the provision discriminated against women workers because "[t]he benefits...that the [deceased] working woman can expect to be paid to her spouse...are less than those payable to the spouse of the deceased male wage earner." 446 U.S. at 147. To determine whether there was unlawful discrimination, the Court compared female and male wage earners.

Indeed, Senator Bayh referred to this line of cases in his remarks on the Senate floor regarding the application of the PDA to spousal benefits plans, observing that "the history of sex discrimination cases under the 14th Amendment in addition to previous interpretations of the Title VII regulations relating to the treatment of dependents" would require companies that provide comprehensive coverage for female employees' spouses also to provide comprehensive coverage for male employees' spouses.51/

Petitioner does not dispute the validity of any of these basic principles. However, petitioner does not reach the

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51/ 123 Cong. Rec. S15037 (daily ed. Sept. 16, 1977). Senator Bayh was a co-sponsor of S. 995. Moreover, as a leading proponent of women's rights, chief sponsor of the Equal Rights Amendment, and the sponsor and floor manager in the Senate of Title IX of the Education Amendments of 1972, Senator Bayh had substantial expertise in sex discrimination law. His analysis of what would constitute sex discrimination if the PDA were enacted thus may not be easily disregarded.

application of these principles to this case, contending instead that this case is governed by Gilbert. For the reasons previously discussed, Gilbert is no longer valid, and these basic principles must be applied to petitioner's Plan in light of the PDA's clarification of the definition of sex discrimination.

B. Application of Title VII as Amended by the PDA Invalidates Petitioner's Medical Benefits Plan.

Petitioner's Plan limits the hospitalization benefits provided to male employees for their spouses; there is no such limitation upon the benefits provided to female employees for their spouses. Application of the relevant principles of law to this Plan yields the conclusion reached by the Fourth Circuit -- that petitioner's Plan unlawfully discriminates against its male employees. First, this case involves a claim of discriminatory treatment of male employees and is therefore cognizable under Title VII.

Second, this discriminatory treatment involves a differential in fringe benefits -- here, hospitalization coverage -- provided to the male and female employees. Third, that differential stems from the differential in hospitalization coverage provided to employees for their spouses, and thus constitutes different treatment of the employees themselves. Finally, that difference in the employees' spousal benefits is based upon pregnancy, which, as a matter of law, is a prohibited sex-based classification under Title VII as amended by the PDA. In other words, because the disparate treatment of the employees' spouses is based on pregnancy, it is sex-based; since sex-based disparate treatment of employees' spouses constitutes sex-based disparate treatment of the employees themselves, petitioner's limitation upon the pregnancy-related benefits in its employees' spousal coverage constitutes unlawful sex discrimination against its male employees.

CONCLUSION

For all the above reasons, this Court should affirm the judgment of the court below.

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